

Fact Sheet: State or Tribal Assumption of the Section 404 Permit Program

The Clean Water Act provides states and tribes the option of assuming administration of the Clean Water Act section 404 permit program in certain waters within state or tribal jurisdiction. This fact sheet describes reasons why states and tribes might assume administration of the section 404 program from the Federal government, which waters could be administered by states or tribes under this program, and the process for assuming administration of these waters.

Why Assume Administration of the Section 404 Program?

More than a dozen states already are currently administering aquatic resources/wetlands protection programs similar to the Federal Clean Water Act Section 404 program. This makes sense because state and tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with local resources, issues, and needs than are Federal regulators. By formally assuming administration of the Federal regulatory program, states or tribes can eliminate unnecessary duplication between programs. If states or tribes assume program administration, section 404 permit applicants would need only a state or tribal permit for dredged or fill material discharges in certain waters.

Which Waters Can States/Tribes Administer under the Section 404 Program?

States and tribes can assume administration of the Clean Water Act section 404 program only in certain waters. The U.S. Army Corps of Engineers retains jurisdiction in -

- tidal waters and their adjacent wetlands
- waters used as a means to transport interstate or foreign commerce and their adjacent wetlands.

Assumption under Clean Water Act section 404 does not affect the U.S. Army Corps of Engineers' responsibilities to regulate navigable waters under Section 10 of the Rivers and Harbors Act of 1899.

How to Assume the Section 404 Program

To assume the Section 404 program, states or tribes need to develop a wetlands permit program consistent with the requirements of the Clean Water Act and regulation at 40 CFR 233 and submit to the EPA a request to assume the program. (See the flow chart below for details on this process.) Even for states or tribes with an existing wetlands regulatory program, this process may require the passage of new state or tribal legislation. To be eligible to assume the Federal program, a state or tribe's program must:

- have an equivalent scope of jurisdiction,
- regulate at least the same activities,
- provide for sufficient public participation,
- ensure compliance with the Section 404(b)(1) guidelines, which provide environmental criteria for permit decisions, and
- have adequate enforcement authority.

What Happens After States or Tribes Assume the Program?

When states or tribes assume administration of the section 404 program, the U.S. Army Corps of Engineers no longer processes Section 404 permits in waters under state or tribal jurisdiction. The state or tribe assumes responsibility for the program, determines what areas and activities are regulated, processes individual permits for specific proposed activities, and carries out enforcement activities consistent. EPA reviews the program annually to ensure the state or tribe is operating its program in compliance with requirements of the Clean Water Act. In addition, for some activities, which generally include larger discharges with serious impacts, EPA and other Federal agencies review the permit application and provide comments to the state or tribe; the state or tribe cannot issue a permit over EPA's objection.

Status of State/Tribal Section 404 Program Assumption

To date, two states, Michigan and New Jersey, have assumed administration of the Federal permit program. Other states and some tribes are working toward or investigating the possibility of assuming the permit program. Reasons states have expressed for not more actively pursuing assumption of the program include lack of funding, lack of clarity on which waters are assumed under a state or tribes program, concerns regarding Federal requirements and oversight, availability of alternative mechanisms for state/tribal wetlands protection, and the controversial nature of regulation of wetlands and other aquatic resources.

For More Information

If your state or tribe is interested in assuming administration of the Federal Section 404 permit program, contact the EPA Regional Office in your area. Call the EPA's Oceans, Wetlands, and Communities Division to determine the appropriate EPA contact at (202)566-1348. EPA also can provide technical assistance (and may also be able to provide some financial assistance through the competitively awarded Wetland Program Development Grants) to help states and tribes develop the authority, capability, and documentation needed to assume the Clean Water Act section 404 permit program.

Additional information on section 404 assumption is available from the [[HYPERLINK "http://www.aswm.org/20-wetland-programs/s-404-assumption"](http://www.aswm.org/20-wetland-programs/s-404-assumption)].

Publications of Interest

- Clean Water Act, Section 404 Program Definition and Permit Exemptions; Section 404 State Program Regulations, June 6, 1988, Federal Register, 40 CFR Parts 232 and 233.
- Clean Water Act, Section 404 Tribal Regulations, February 11, 1993, Federal Register, 40 CFR Parts 232 and 233.

State or Tribal 404 Assumption Process

State or Tribe submits a complete assumption application: The Governor of the State or Equivalent Tribal entity* submits to EPA a full and complete description of the program it proposes to establish and administer under State law or an interstate compact. The State must also submit a statement from the State Attorney General certifying that the State laws provide adequate authority.



EPA Reviews Application: EPA is responsible for reviewing and approving/ denying a State or Tribe's request to assume the Federal permit program within 120 days of receipt of the completed application.



Distribution of Application for Public Comment: EPA distributes application for State or Tribal assumption to other Federal agencies.



Public Hearing: EPA also makes the State/Tribal application available for public review and comment and holds public hearing(s) in the State.



EPA Decision: After reviewing the State or Tribal application and considering any Federal agency and public comments, EPA makes a decision of the requirements to assume the Federal permit program. EPA's decision is based on whether the State or Tribe meets the applicable statutory and regulatory requirements for an approvable program.



Assumption Request is Approved or Denied

*NOTE: Tribes are eligible to apply to assume the Federal permit program after they have met requirements for "treatment as a state." See the February 11, 1993, Federal Register notice. (See Publications of Interest for details.)